SUPREME COURT

MAR 4 1974

No. 73-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

ROBERT KENNETH DEWEY, Petitioner,

v.

REYNOLDS METALS COMPANY, Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE OF NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, AMERICAN JEWISH COMMITTEE AND ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AS AMICI CURIAE

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TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	1
QUESTIONS PRESENTED	3
ARGUMENT	
Introduction and Summary	4
I. Petitioner's Observance of a Weekly Day of Rest Is "Religion" Within the Meaning of the Civil Rights Act of 1964	5
II. The Effect of Respondent's Purportedly "Neutral" Employment Policy Is To Discriminate Against Those Who Observe a Religious Day of Rest	89
III. The Interpretive Regulation of Equal Employment Opportunity Commission of July 1967 Requiring Reasonable Accommodation to an Employee's Religious Requirements, in the Absence of Undue Hardship, Is a Proper Statutory Interpretation and May Be Applied to the Facts of This Case	12
IV. Respondent Failed To Make a Reasonable Accommodation to Petitioner's Religious Scruples Against Personally Obtaining a Replacement for Sunday Work	16
CONCLUSION	19
APPENDIX	

TABLE OF AUTHORITIES

CASES:

The Abbotsford, 98 U.S. 440 (1879)	8
Barnett v. *Rodgers*, 410 F. 2d 995 (D.C. Cir. 1969)	13
Cantwell v. *Connecticut*, 310 U.S. 296 (1940)	6

Page

Cooper Mfg. Co. v. Ferguson, 113 U.S. 727 (1885) 7
Dabbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968) 9
Grigs v. Duke Power Co., 420 F. 2d 1225 (4th Cir. 1970), cert. granted No. 124, OT 1970 10
Hecht v. Malley, 265 U.S. 144 (1924) 8
In re Jenison, 375 U.S. 14 (1963) 5, 6, 8
Jones v. Lee Way Motor Freight, Inc., 431 F. 2d 245 (10th Cir. 1970) 9
Local 53 v. Vogler, 407 F. 2d 1047 (5th Cir. 1969) 9
Local 189, United Papermakers v. United States, 416 F. 2d 980 (5th Cir. 1969) 9
Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969) 14
Reina v. United States, 364 U.S. 507 (1960) 8
Rosado v. Wyman, 397 U.S. 397 (1970) 14
Shapiro v. United States, 335 U.S. 1 (1948) 8
Sherbert v. Verner, 374 U.S. 398 (1963) 4, 5, 6, 7, 8, 11, 13
Udall v. Tallman, 380 U.S. 1 (1965) 14
United States v. Bethlehem Steel Corp., 312 F. Supp. 977 (W.D. N.Y. 1970) 9
United States v. Hayes International Corp., 415 F. 2d 1038 (5th Cir. 1969) 9
United States v. IBEW Local No. 38, 428 F. 2d 144 (6th Cir. 1970) 9
Weeks v. Southern Bell Telephone and Telegraph Co., 408 F. 2d 228, 235 (5th Cir. 1969) 15
Welsh v. United States, 398 U.S. 333 (1970) 8
Williams v. Illinois, 399 U.S. 235 (1970) 11

CONSTITUTION OF THE UNITED STATES CITED:

United States Constitution

First Amendment 7, 8, 11, 14
Fifth Amendment 7
Fourteenth Amendment 7, 11

STATUTES: Page

42 U.S.C. 2000e-2(a)(1) 2, 3

Civil Rights Act of 1964
Title VII 11, 17
Section 703(a)(1) 2, 3, 5, 7, 8

EEOC Regulations
Section 1605.1 ..... 12, 14
Section 1605.1(a) 15
Section 1605.1(d) 15

35 *Fed. Reg.* 19580-19581 (daily ed. December 24, 1970) 12

MISCELLANEOUS:

Deuteronomy, V, 12, 14 2
3 Maimonides, *Mishne Torah*, "Laws of the Sabbath" ch. 6 16

IN THE

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OCTOBER TERM, 1970

No. 835

ROBERT KENNETH DEWEY, *Petitioner*

v.

REYNOLDS METALS COMPANY, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE

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1. The National Jewish Commission on Law and Public Affairs (COLPA), a voluntary association organized to combat all forms of religious prejudice

and discrimination and to represent the position of the Orthodox Jewish Community in matters of public concern, hereby applies on its own behalf and on behalf of the American Jewish Committee and the Anti-Defamation League of B'nai B'rith, for leave to submit the attached brief.

2. Pursuant to Rule 42(3) of the Revised Rules of this Court, consent to the filing of this brief was requested of the parties on January 25, 1971. Counsel for petitioner consented on January 29, 1971, to the filing of the brief, but counsel for respondent replied on February 3, 1971, that "it would not be appropriate for it [*i.e.*, respondent] to select those to whom it might grant or withhold its consent but rather this issue should be left to the discretion of the Supreme Court."

3. The National Jewish Commission on Law and Public Affairs filed *amicus* briefs in this case in the District Court, during its initial consideration by the Court of Appeals, again in support of the petition for rehearing, and again on the filing of a petition of a writ of certiorari with this Court. Its Memorandum in support of the Petition was filed with the consent of both parties.

4. The *amici* are concerned with the problem of protecting racial and religious minorities against discrimination in all aspects of life and securing for all Americans full and equal employment opportunity. Among the principal areas which have occupied the concern of COLPA and the other *amici* has been that of employment for Sabbath-Observers, who have been the victims of much discrimination in the past. The instant case is the first to come to this Court on the

subject of religious discrimination in employment, and the familiarity of the *amici* with the case law and constitutional principle on the subject will, we believe, assist the Court in its consideration of the important issues at stake.

CONCLUSION

For the foregoing reasons, the motion to file the attached brief *amici curiae* should be granted.

Respectfully submitted,

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BRIEF OF NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, AMERICAN JEWISH COMMITTEE AND ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AS AMICI CURIAE

INTEREST OF THE AMICI CURIAE

The National Jewish Commission on Law and Public Affairs (COLPA) is a voluntary association of lawyers and social scientists organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox Jewish community in matters of public concern.

The interest of the National Jewish Commission on Law and Public Affairs in this case—in which it filed briefs in the District Court and the Court of Appeals

—arises out of the vital importance of the legal issues presented in the within case to Sabbath-Observers throughout the country, and particularly to Orthodox Jews who are enjoined by Biblical command to "observe the Sabbath day to keep it holy" and "not [to] do any manner of work" on that day (*Deuteronomy*, V, 12, 14).

The American Jewish Committee, founded in 1906, was incorporated by Act of the Legislature of the State of New York in 1911. It has long been a fundamental tenet of the American Jewish Committee that the welfare and security of all religious groups in the United States depend upon the preservation of Constitutional guarantees. The American Jewish Committee believes that the religious liberty of Jews will only be fully secure when the religious liberty of American citizens of all faiths is fully secure.

The Anti-Defamation League, an arm of B'nai B'rith, is a voluntary organization which has long been concerned with the preservation of the religious freedom and Constitutional rights of Jews in America. It is deeply committed to the belief that the religion clauses of the First Amendment are the surest guarantee of religious liberty and have proved the greatest guarantor of freedom of religion for all.

In the view of the *amici*, Congress' prohibition against discrimination on account of "religion" in Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), was designed to secure the rights of individual employees to the free exercise of religious practices such as Sabbath-observance wherever such practices would not impose a demonstrable undue hardship on an employer. The majority of the court below has construed the Act to deprive the religiously observ-

ant of that right, and the corresponding right to equality of employment opportunity free from discrimination, notwithstanding the definitive interpretation given the Act by the federal agency charged with its administration and implementation. In our view, the holding below presents a grave danger to religious liberty in this country and must be reversed by this Court.

QUESTIONS PRESENTED

1. Whether the prohibition in Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), against employment discrimination "because of [an employee's] * * * religion" requires an employer to make reasonable accommodation to an employee's religious observance of a weekly day of rest.

2. Whether an employer may refuse to make a reasonable accommodation to an employee's observance of a weekly day of rest because of a collective-bargaining agreement which prescribes the method for apportioning overtime work without reference to religious needs.

3. Whether the interpretive regulation construing the statutory term "religion" issued by the Equal Employment Opportunity Commission in July 1967 is a proper statutory interpretation, and whether its application to facts occurring in September 1966, amounts to *ex post facto* rulemaking.

4. Whether petitioner forfeited his Civil Rights Act remedy by unsuccessfully pursuing arbitration of his grievance under the collective-bargaining agreement.

Our brief is addressed to the first three of the above questions.

ARGUMENT

INTRODUCTION AND SUMMARY

Petitioner's religious beliefs require him to abstain from labor on Sundays, and the issue here is simply whether federal law permits him to be discharged because he refuses to deviate from the command of his faith. There is no possible claim that the conduct in which his religion directs him to engage presents any "threat" whatever—much less a "substantial threat" —"to public safety, peace or order." *Sherbert* v. *Verner*, 374 U.S. 398, 403 (1963). Nor is there any question as to the sincerity of the belief which prompts him to act as he does.

Our argument that the conduct of petitioner's employer violated the Civil Rights Act proceeds from four premises: (1) The term "religion" as used in the Civil Rights Act of 1964 encompasses—as does the same term in the First Amendment—not merely belief but also conduct which is not socially harmful. (2) An employer engages in "discrimination" within the meaning of the Act if he rigidly applies a hiring, wage, or promotion policy which though appearing neutral on its face necessarily and ineluctibly imposes disabilities upon and effectively forecloses employment to individuals of a certain race or religion by reason thereof. (3) If an employer's superficially "neutral" policy has such an effect, he at least has the burden of demonstrating that accommodation of that policy to the needs of the religious-minority member will result in undue hardship to the operation of his business. (4) No adequate accommodation was made in this case to petitioner's legitimate religious needs.

I

Petitioner's Observance of a Weekly Day of Rest Is "Religion" Within the Meaning of the Civil Rights Act of 1964

Section 703(a)(1) of the 1964 Civil Rights Act flatly prohibits the "discharge [of] any individual * * * because of such individual's * * * religion * * *." Petitioner's employment was terminated because he refused, in accordance with his religious beliefs, to work overtime on Sundays and to obtain a replacement for his assigned overtime Sunday shifts. The initial question, therefore, is whether his discharge on this account amounted to discharge "because of" his "religion."

The majority of the Court of Appeals read "religion" narrowly and thereby misapplied the Act. It held that the "reason for [petitioner's] discharge was not discrimination on account of his religion" (App. 131a), and, on rehearing, it construed "religion" as limited to the right to hold "religious beliefs" (App. 142a). In fact, the record indisputably discloses that the sole reason for petitioner's discharge was his adherence to a principle of conduct commanded by his faith. And conduct such as observance of a weekly day of rest is protected by the constitutional and statutory safeguards for religious freedom.

That proposition was firmly established by this Court's decisions in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *In re Jenison*, 375 U.S. 14 (1963). In the *Sherbert* case, the Court held that "overt acts prompted by religious beliefs or principles" are "within the reach of state legislation" only if they pose "some substantial threat to public safety, peace or order." 374 U.S. at 403. At issue in *Sherbert* was the same conduct as

is at issue here—"conscientious objection to * * * work" on one day of the week—and this Court held that such objection "plainly enough" is protected by the constitutional safeguards for the "free exercise of religion." And the same rule was applied, at the inception of the following Term of Court, to the conscientious refusal to serve on a jury. See *In re Jenison*, 375 U.S. 14 (1963), summarily vacating 265 Minn. 96, 120 N.W. 2d 515 (1963).

As long ago as *Cantwell* v. *Connecticut*, 310 U.S. 296, 308 (1940), this Court recognized that in safeguarding the free exercise of religion the Constitution "embraces two concepts—freedom to believe and freedom to act." 310 U.S. at 303. While the Court conceded that "freedom to act" could not be absolute, it limited the permissible range of regulation of religiously-motivated conduct to that which was "for the protection of society." It also observed that the power to regulate "must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom" 310 U.S. at 304.

Here, as in *Sherbert*, petitioner's conduct did not pose any threat whatever—much less a "substantial threat"—to public safety, peace or order. And, as in *Sherbert*, the conduct was directly traceable to petitioner's religious faith. Accordingly, the discharge of petitioner was well within the prohibition against discrimination on account of religion.

It is no answer to argue—as respondents have below and as the majority of the Court of Appeals did (App. 129a)—that the *Sherbert* decision was a constitutional one applicable to "state action" while the issue here is the applicability of a federal statute to private par-

ties. Both the First Amendment and Section 703 (a)(1) of the Civil Rights Act use the same term—"religion"— and the two should be construed *in pari materia*. For if Congress had intended to safeguard "beliefs" only and to leave conduct beyond the protection of the 1964 Act, it would have used the word "beliefs." By defining the right in terms of "religion"—a word which had been given meaning by this Court in its 1963 *Sherbert* decision and its 1940 *Cantwell* decision—the Congress must have intended the broad interpretation afforded by this Court's constitutional decisions.

The governing rule of statutory interpretation was applied in *Cooper Mfg. Co. v. Ferguson*, 113 U.S. 727 (1885), where the question presented for review was the meaning to be given to terms in a Colorado statute which had been enacted pursuant to the provisions of a section of the Colorado constitution. The Court said (113 U.S. at 732):

> As the clause in the Constitution and the Act of the Legislature relate to the same subject, like statutes *in pari materia*, they are to be construed together.

It is plain from its face and from its legislative history that the Civil Rights Act of 1964 was enacted to provide, *inter alia*, federal judicial remedies for private infringement of rights secured by the Fourteenth Amendment against state action and by the First and Fifth Amendments against federal interference. There can be no question, therefore, as to whether the Constitution and the Civil Rights Act "relate to the same subject," and it is appropriate that they be construed similarly.

Moreover, by incorporating in the 1964 Act a term which this Court had very recently construed in *Sherbert* and *Jenison*, the Congress must be deemed to have acted with the judicial construction in mind. See, *e.g.*, *Reina* v. *United States*, 364 U.S. 507, 510 (1960); *Shapiro* v. *United States*, 335 U.S. 1, 16 (1948); *Hecht* v. *Malley*, 265 U.S. 144, 153 (1924). As long ago as 1879, in *The Abbotsford*, 98 U.S. 440, 444 (1879), this rule of construction was held to apply to "words in a statute * * * [which] had acquired, through judicial interpretation, a well-understood legislative meaning," and the Court held that that meaning "is to be presumed * * * in this instance, unless the contrary is in some way made to appear."

Accordingly, the term "religion" as used in Section 703(a)(1) is not limited to beliefs but extends—as does the Free Exercise Clause of the First Amendment—to action (or, as in this case, refusal to act) based upon religious conviction. Dissenting in *Welsh* v. *United States*, 398 U.S. 333, 372 (1970), Mr. Justice White (speaking also for the Chief Justice and Mr. Justice Stewart) observed that the Religion Clause of the First Amendment "protects conduct as well as religious belief and speech," and he noted that "free exercise values [may] prompt Congress to relieve religious believers from the burdens of the law." 398 U.S. at 373. This case involves precisely that kind of decision by the Congress.

II

The Effect of Respondent's Purportedly "Neutral" Employment Policy Is To Discriminate Against Those Who Observe a Religious Day of Rest

The majority of the Court of Appeals rejected petitioner's claim of religious discrimination on the ground that "the collective bargaining agreement was equal in its application to all employees and was uniformly applied * * *" (Pet. 60a). This conclusion overlooks the necessarily discriminatory *effect* of the terms of the collective-bargaining agreement, and the decided cases squarely hold that effect—and not subjective intent—is the benchmark of statutorily prohibited discrimination.

This rule has been applied repeatedly in cases involving racial discrimination in employment, where collective-bargaining agreements which appear neutral on their face contain provisions which, in actual practice, reduce the employment opportunities of blacks. See, *e.g.*, *Local 53* v. *Vogler*, 407 F.2d 1047, 1054 (5th Cir. 1969); *United States* v. *Hayes International Corp.*, 415 F.2d 1038 (5th Cir. 1969); *Local 189, United Papermakers* v. *United States*, 416 F.2d 980 (5th Cir. 1969); *United States* v. *IBEW Local No. 38*, 428 F.2d 144 (6th Cir. 1970); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970); *Dobbins* v. *Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio 1968); cf. *United States* v. *Bethlehem Steel Corp.*, 312 F. Supp. 977 (W.D.N.Y. 1970). Respondent's "uniformly applied" overtime policy had the same effect on those who, for religious reasons, observe a weekly day of rest as the similarly "neutral" provisions in the collective-bargaining agreements in the cited cases. In each instance, the consequence of the "neutrality" is to re-

duce the employment opportunities of an individual or group. Indeed, in the case of Sabbath-Observers, a policy such as respondent's has the necessary and ineluctible effect of totally *excluding* the conscientious. In the absence of remedial legislation properly construed, individuals such as petitioner, and others such as Orthodox Jews, are effectively denied employment by the application of such "neutral" rules. Simply stated, the effect of respondent's "uniformly applied neutral" policy is to deny employment to Sabbath-Observers.

It is, we submit, plainly insufficient for an employer to attempt to justify such a policy by merely saying that his policy is framed in even-handed terms. If it has the effect of excluding or harming racial or religious minorities, he must show that the requirement which is "uniformly applied" is an essential condition of maintaining and operating his business. Put in another way, the employer must show that to deviate from his policy and accommodate the religious needs of his employee would cause him undue hardship—the standard adopted by the Equal Employment Opportunity Commission. (Point (3), *infra.*) Dissenting in *Griggs* v. *Duke Power Co.*, 420 F.2d 1225 (4th Cir. 1970), certiorari granted, No. 124, this Term, Circuit Judge Sobeloff said (420 F.2d at 1238):

> Overt racial discrimination in hiring and promotion is banned. So too, the statute interdicts practices that are fair in form but discriminatory in substance. Thus it has become well settled that "objective" or "neutral" standards that favor whites but do not serve business needs are indubitably unlawful employment practices. The critical inquiry is *business necessity* and if it cannot be shown that an employment practice which ex-

> cludes blacks stems from legitimate needs the practice must end. * * * For example, a requirement that all applicants for employment shall have attended a particular type of school would seem racially neutral. But what if it develops that the specified schools were open only to whites, and if, moreover, they taught nothing of particular significance to the employer's needs? No one can doubt that the requirement would be invalid.

The lesson here is also to be learned from *Sherbert* v. *Verner*, 374 U.S. 398 (1963), where this Court concluded that a seemingly even-handed unemployment-compensation policy could constitutionally be applied to the detriment of Sabbath observers *only* if it were supported by a "compelling * * * interest." Mere aesthetic interest in achieving uniformity of rules was not deemed sufficient in *Sherbert* to entitle the State to override the religious needs of the Sabbath-observer. And the obligation of the private employer under Title VII of the Civil Rights Act of 1964 is, as we have shown above, no less in kind or degree than the obligation of federal, state and local governments under the First and Fourteenth Amendments.[1]

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[1] The importance of looking beyond "neutrality" of a rule was demonstrated by this Court's opinion of last Term in *Williams* v. *Illinois*, 399 U.S. 235 (1970), wherein the Chief Justice observed that a statute which appeared to apply equally to all defendants actually "visited different consequences on two categories of persons." The same is true of the seemingly "evenhanded" overtime clause of the labor contract which is involved in this case.

III

The Interpretive Regulation of Equal Employment Opportunity Commission of July 1967 Requiring Reasonable Accommodation to an Employee's Religious Requirements, in the Absence of Undue Hardship, Is a Proper Statutory Interpretation and May Be Applied to the Facts of This Case

The District Court concluded, on the stipulated facts, that petitioner's claim was governed by Section 1605.1 of the Regulations of the Equal Employment Opportunity Commission (quoted at pp. 94a-95a of the Single Appendix). That regulation, which was issued on July 10, 1967, interpreted the religion provision of the Civil Rights Act as requiring employers "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business," and it imposed on the employer the burden of proving that asserted "undue hardship" exists.

The EEOC regulation—which has been the model for similar guidelines by local agencies in at least four States and in New York City,[2] and by other agencies of the federal government[3]—is a proper—if not, indeed, necessary—construction of the Act. It is applicable to this case because it represents the considered judgment of the agency charged with enforcement of

[2] See the Appendix to our Memorandum in support of the petition for a writ of certiorari.

[3] On December 21, 1970, the Secretary of Labor issued Proposed Rule Making on the subject of "Reasonable Accommodations to the Religious Needs of Employees and Applicants" which appeared at 35 Fed. Reg. 19580-19581 (daily ed. December 24, 1970). The proposed rules—which are reprinted as an appendix to this brief—apply the same guidelines to government contractors and subcontractors.

the federal statute as to the meaning of one of its provisions. And the fact that that judgment was not published until after petitioner's discharge does not lessen its effect on this case or on petitioner's past and future rights under the Act.

The "reasonable accommodation" requirement is nothing less than a formulation, in different terms, of the legal rule applied in *Sherbert* v. *Verner, supra,* and lower-court decisions such as *Barnett* v. *Rodgers,* 410 F.2d 995 (D.C. Cir. 1969). In *Sherbert,* this Court held that the Constitution's solicitude for religion requires some flexibility in the administration of a State's unemployment-compensation system to take account of the conscientious scruples of a Sabbath-Observer. In essence, what the Court did was to direct South Carolina to make an accommodation in its otherwise superficially "neutral" policy for those whose religion required them to abstain from work on Saturdays.

In *Barnett* v. *Rodgers, supra,* the Court of Appeals for the District of Columbia Circuit considered the demand of Black Muslim prisoners in D. C. Jail for a pork-free diet. The court's holding was (410 F.2d at 1000, footnotes omitted):

> Where governmental activity impairs individual ability to abide religious beliefs, two demonstrations become essential to its validity. The first is a clear showing that "any incidental burden on the free exercise of appellant's religion [is] justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate * * *;'" on this score, "[o]nly the gravest abuses, endangering paramount interests" can engender permissible limitations on free exercise. The second is an equally

> convincing showing that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights." For "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." However attractive the end to be achieved, the means employed must hoard First Amendment values.

The rule that a government agency may not, by its action, "impair individual ability to abide religious beliefs" unless it can show convincingly that a "compelling" interest requires it and that no less harmful "alternatives" are available to achieve the same goal is merely another way of requiring the agency to make a "reasonable accommodation" to an individual's religious needs and imposing on it the burden of establishing its position convincingly if it claims that such an accommodation is impossible.

Our position is, therefore, that even without the EEOC regulation, the statutory protection for "religion," construed in light of this Court's First Amendment decisions, sustains petitioner's contention. If, however, there be doubt as to the meaning of the statutory language, we believe that the authoritative interpretation of the EEOC, as reflected in the present Section 1605.1, concludes the issue. For under a long line of decisions culminating with *Udall* v. *Tallman*, 380 U.S. 1, 16 (1963), and several recent cases applying *Udall*, this Court has applied the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *Federal Communications Commission*,

395 U.S. 367, 381 (1969); see *Rosado* v. *Wyman*, 397 U.S. 397, 415 (1970).[4]

The present regulation involves the meaning of the statute; the Civil Rights Act did not give the EEOC substantive authority to make law, and the agency did not purport to exercise any such authority. Indeed, subsection (a) of the regulation plainly demonstrates, on its face, that the issue to which it is addressed is a matter of statutory construction—*i.e.*, "whether it is discrimination on account of religion to refuse to hire * * *," and subsection (d) indicates that the EEOC intends to consider future cases "on an individual basis" in light of the interpretive guideline.

In these circumstances, the majority of the Court of Appeals was plainly wrong in characterizing the application of the current interpretation to incidents occurring in 1966 as *ex post facto*. Courts and adjudicatory agencies are constantly in the business of applying their current understanding of statutory terms to past incidents; that process has never been thought to constitute unfair surprise to the parties. Nor, indeed, can respondent claim surprise here. For, as Circuit Judge Combs noted in dissent (App. 138a), the obligation on an employer to "accommodate to religious needs of employees" was part of the 1966 interpretation of the Act, even though it was not spelled out in the same specific form as the 1967 and current interpretations.[5] In this case, therefore, petitioner's

[4] This doctrine has been applied to interpretive guidelines of the EEOC as well. *Weeks* v. *Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969).

[5] The District Court went further than it had to by limiting any back-pay award to the time after August 1, 1967—several weeks after the issuance of the current interpretive regulation—on the theory that "before then defendant was not on notice as to the meaning of the statute" (App. 115a).

rights were properly measured by the most recent authoritative statutory construction provided by the federal agency, and that construction was at least consistent with—if not demanded by—this Court's earlier decisions.

IV

Respondent Failed To Make a Reasonable Accommodation to Petitioner's Religious Scruples Against Personally Obtaining a Replacement for Sunday Work

We turn finally to the alternative conclusion of the majority of the Court of Appeals that respondent had made a reasonable accommodation to petitioner's religious needs by permitting him to obtain a replacement for Sunday assignments (App. 132a, 144a)—a "privilege" which, according to the majority, he "stubbornly refused to exercise" (App. 132a). The majority of the Court of Appeals erred in assuming, on the stipulated facts of this case, that the "privilege" amounted to any "accommodation" whatever. And the majority's characterization of petitioner's refusal as "stubborn" demonstrates its total misunderstanding of the nature of his religious convictions.

The stipulation of facts established that petitioner's religious beliefs affected his Sunday overtime assignments in two distinct ways: *First*, he "refused to work because of his religious beliefs" (App. 42a); and *second*, "he * * * refused because of his religious beliefs to obtain a replacement[6] in accordance with the replacement system" (*ibid.*) which respondent had put into effect in response to an earlier unrelated union

[6] The principle that it is impermissible to ask another person to do forbidden work on the Sabbath is not unique to petitioner's faith. A similar rule applies in the Jewish tradition. See 3 Maimonides, *Mishne Torah*, "Laws of the Sabbath" ch. 6.

inquiry (App. 53a-54a). It was also stipulated that "the sincerity of [petitioner's] personal religious beliefs is not contested" (App. 45a).[7]

The accommodation which respondent is said to have made to petitioner's religious needs touched only the first of these conscientious scruples; it was plainly no answer whatever to the second. By advising petitioner that he could avoid Sunday duty by violating another rule of his faith relating to Sunday observance, respondent was, in effect, telling petitioner that no accommodation was possible and that his conscientious Sunday observance would cost him his job.

A ready alternative available to the respondent was to select petitioner's replacements itself, and it apparently followed this course, without any sign of hardship, when petitioner refused to budge from his religious convictions. (See App. 63a—"When Mr. Dewey failed to report into work Sunday, Mr. Zaagman was ask [sic] to work an additional shift due to Mr. Dewey's absence.") The only suggestion from the parties as to why respondent was unwilling to make the selection of replacement employees is the cryptic assertion that such acts "would result in a waiver of the compulsory overtime provisions of the Labor Agreement" (App. 45a). Surely respondent is not given a right—which it may refuse to "waive"—by the labor agreement to violate federal law. Yet that is the only apparent explanation for its failure to take the obvious step.

[7] There is no apparent motive other than the religious one for petitioner's refusal to work on Sundays. Since the overtime provisions of the labor contract prescribe that double time is to be paid for Sunday work (App. 48a), economic motivations would seem to favor such assignments.

The record squarely belies the suggestion, made apparently *sua sponte* by the majority of the Court of Appeals, that if respondent were to select replacements it would "create chaotic personnel problems" and give rise to a "charge of unequal naming of replacements" (App. 132a). For in the grievance arbitration proceeding, the union—which would surely have been the first to raise such claims—supported the petitioner and urged "that if the Company had wanted to work out the problem it could and should have cooperated with the Union in obtaining replacements for the grievants instead of penalizing these men for their religious beliefs" (App. 74a-75a). And the arbitrator squarely rejected the argument based upon petitioner's conscientious refusal to seek a replacement not because of any alleged administrative hardship but by concluding (App. 77a): "I do not question the sincerity of their conviction that it would be sinful for them to look for a replacement, but I consider it to be misconduct under the Agreement for them to have refused to do so."[8]

The only conclusion sustainable on the record is the conclusion reached by the District Judge—"Requiring the employee to obtain a qualified replacement may be some accommodation to those who do not approve of Sunday work, but it is no accommodation whatsoever to those who believe, as petitioner does, that it is a sin to induce another to commit the sin of working on

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[8] We do not, of course, mean to suggest that the side the union takes is dispositive. In many instances, provisions in labor agreements which both employers and unions wish to preserve have the effect of discriminating against minorities. See authorities cited at p. 9, *supra*. But the union's readiness to support petitioner in this case demonstrates the insubstantiality of any claim of unfairness to other employees.

Sunday. As to this sincere religious belief of petitioner, respondent has made no accommodation" (App. 101a).

CONCLUSION

In enacting Title VII of the Civil Rights Act of 1964 Congress intended to prohibit all forms of racial and religious discrimination in private employment and to afford meaningful equal economic opportunity to all citizens. This case tests whether that promise is to be made a reality for those whose creed requires them to act or refrain from acting in a manner which does no harm to others. The record in this case demonstrates graphically that petitioner has been discharged from a job he has held for much of his adult life solely because he has refused to surrender his conscience to the demands made of him by his employer. And the employer has provided no justification for making the inflexible demands it has made. Accordingly, the judgment of the Court of Appeals should be reversed and the case remanded with instructions to affirm the judgment entered by the District Court.

Respectfully submitted,

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APPENDIX

DEPARTMENT OF LABOR

Office of the Secretary

[41 CFR Part 60]

Reasonable Accommodations to the Religious Needs of Employees and Applicants

Notice of Proposed Rule Making

Notice is hereby given that, pursuant to Executive Order 11246 (30 F.R. 12319), as amended by Executive Order 11375 (32 F.R. 14303), the Secretary of Labor is considering the addition of a new section 60-1.10, entitled "Reasonable Accommodations to the Religious Needs of Employees and Applicants," to Title 41 Part 60-1 of the Code of Federal Regulations.

The purpose of the proposed addition is to clarify the obligations of contractors and subcontractors subject to Executive Orders 11246 and 11375 with respect to the religious needs of their employees.

This proposed addition concerns matters relating to public contracts. While public participation in this rule-making is not required by 5 U.S.C. 553, the Department wishes to invite written comments, suggestions, or objections regarding this proposed addition. Accordingly, interested persons are invited to submit written comments, regarding the proposed addition to Mr. Arthur A. Fletcher, Assistant Secretary for Workplace Standards, U.S. Department of Labor, 14th Street and Constitution Avenue NW., Washington, DC 20210, within 30 days after the date of publication of this notice in the FEDERAL REGISTER.

Part 60-1 of Chapter 60 of Title 41 of the Code of Federal Regulations is hereby amended by adding § 60-1.10, reading as follows:

§ 60-1.10 Observance of Sabbath and other holidays.

(a) In order to comply with his obligations under the equal opportunity clause an employer must make reasonable accommodations to the religious needs of employees and applicants for employment who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days. The obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and applicants for employment exists when such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(b) Because the employer has the information upon which a judgment may be made, he has the burden of showing that an undue hardship renders the required accommodations to the religious needs of the employee or applicant unreasonable.

(c) Every employer shall maintain and preserve records containing the following information:

(1) Names and addresses of each employee and applicant for employment described in paragraph (a) of this section who has been discharged or denied employment and the reason or reasons in detail upon which the employer relies in justifying such discharge or refusal to hire.

(2) A listing of all job categories (job "category" herein meaning one or a group of jobs having similar content, wage rates and opportunities) for which the employer will make no accommodations to the religious needs of employees or applicants and detailed reasons in support of the employer's position in this regard.

(d) Upon request by an interested individual or organization, a prime contractor or subcontractor shall provide an assurance, in the form of a signed or endorsed notice which shall be made available for general distribution in connection with solicitation or advertisement for employees, expressly stating the extent to which the prime contractor or subcontractor will accommodate to the religious needs of employees who observe Friday evening and Saturday, or some other day of the week, as the Sabbath, or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

(E.O. 11246, 30 F.R. 12319; E.O. 11375, 32 F.R. 14303)

Signed at Washington, D. C., this 21st day of December 1970.

J. D. HODGSON,
Secretary of Labor.

[F.R. Doc. 70-17371; Filed, Dec. 23, 1970; 8:50 a.m.]